Early Journal Content on JSTOR, Free to Anyone in the World

This article is one of nearly 500,000 scholarly works digitized and made freely available to everyone in the world by JSTOR.

Known as the Early Journal Content, this set of works include research articles, news, letters, and other writings published in more than 200 of the oldest leading academic journals. The works date from the mid-seventeenth to the early twentieth centuries.

We encourage people to read and share the Early Journal Content openly and to tell others that this resource exists. People may post this content online or redistribute in any way for non-commercial purposes.

Read more about Early Journal Content at http://about.jstor.org/participate-jstor/individuals/early-journal-content.

JSTOR is a digital library of academic journals, books, and primary source objects. JSTOR helps people discover, use, and build upon a wide range of content through a powerful research and teaching platform, and preserves this content for future generations. JSTOR is part of ITHAKA, a not-for-profit organization that also includes Ithaka S+R and Portico. For more information about JSTOR, please contact support@jstor.org.

ORAL AGREEMENTS FOR REAL ESTATE COPARTNERSHIPS.

THE usual form of the Statute of Frauds provides that no estate or interest in real property, nor any trust or power over or concerning the same, or in any manner relating thereto, can be created or declared otherwise than by operation of law, or conveyance or instrument in writing subscribed in the manner provided for; and that agreements for the sale of real property, or of any interest therein, are invalid unless the same, or some memorandum thereof, be in writing and subscribed in the manner provided for. That statute, at least so far as the express enactment goes, applies as well to transactions between parties proposing or intending to become partners as to transactions between individuals not occupying, or proposing to occupy, a fiduciary relationship to each other. Does this provision of the statute, by its true intent, make invalid an oral agreement for the formation of a copartnership, the express purpose of which is to acquire and hold real property intended to be vested in all of the proposed partners? Or, in other words, can every form of copartnership be created by oral agreement so far as its real property aspects are concerned? And can a trust be predicated in lands upon proof of an oral agreement to create a partnership for the purpose of acquiring such lands, the partnership relation not having existed at the time of acquiring title, unless by said agreement, and no funds having been contributed by the party seeking to establish the trust?

It is true, of course, — and much of the confusion in the cases on this subject seems to arise from a failure to recognize this distinction, — that where parties already occupy toward each other a fiduciary relationship, in the exercise of which one of the parties in violation of his duty acquires an interest in real property that in whole or in part should belong to the other, the estate will be decreed to vest, or at least a trust will be declared, according to the right, and without the usual evidence required by the Statute of Frauds. This is not a case to that extent of a judical repeal of the statute, but of an express exception made by the statute itself. Indeed, where by *competent* evidence it is shown that a copartnership exists, then it may be shown, even by oral evidence,

and whether the question arise between the parties themselves, or between them and third persons, that its property consists of land. In the same way, where one furnishes the consideration in whole or in part, and another takes the entire title, the latter will, of course, be declared to hold in trust for the one who has furnished the consideration to the extent that he has so done.

These are the perfectly well understood examples of constructive and resulting trusts expressly made exceptions by the words of the statute itself. They do not, at least directly, determine the question of the validity of an oral agreement of copartnership providing for the purchase and ownership of real estate, where the status of copartnership has not previously existed, but is intended to be created by the very agreement, whose validity, because of its real property aspects and because of its oral form, is under consideration. In other words, these exceptions still leave it open to inquire if an oral agreement between A and B to become partners in the acquisition and operation of real property is valid under the Statute of Frauds, and, if not valid in other respects, if it is valid to create the status of copartnership?

The authorities on the point, at least in the arguments employed, are apparently in direct conflict. Those which maintain (whether or not their facts necessarily involve the question) that such agreements are valid though resting in parol, concede that the doctrine adopted by them is modern, and that at one time the rule was the other way. The so-called modern doctrine is traced to the case of Dale *v.* Hamilton,[1] which was an oral agreement for the purchase of a tract of land to be taken in the name of one of the parties who furnished the capital, laid out in lots and resold, the profits to be divided between the parties. It will presently be seen that in cases of that character a special principle may be said to be applicable, but, at all events, the reasoning of the Vice-Chancellor, in the lengths to which he goes, is not satisfactory, and he virtually admits that his decision, to the extent that it goes, is a repeal of the statute.

The objections to the so-called old rule are stated under varying circumstances. Sometimes they occur where the interest is one in profits arising from the purchase and disposition of real property, and where, therefore, no interest in real property, as such, is intended to be created. Sometimes it happens that the fund with which the property is to be acquired is contributed by both parties

[1] 5 Hare, 369.

to the proposed partnership arrangement in whatever proportions. Sometimes it is said that for all purposes partnership realty is to be regarded as personalty, and that, therefore, the Statute of Frauds has no application to such agreements. And finally it is sometimes said, thus probably furnishing the strongest argument in support of the validity of these agreements, that an agreement for a copartnership to invest generally in real property cannot be said to be one for the creation of an estate or interest in real property, or any trust or power over or concerning it, or in any manner relating thereto, because there is at the time of the making of an agreement no specific property in which the interest is to be created, or at least no ownership by any of the parties to the agreement in any real property upon which the agreement could be said to operate. In the last of which examples, it may be said that the sole purpose of the agreement is to create the fiduciary relationship, and the respective rights and obligations of the parties to it.

(*a*) As already stated, there can be no question of the rights of the parties where they all contribute to the fund that pays for the real property.[1] But their rights in such a case arise, not from the agreement, or the relationship of the parties, but from the contribution of the purchase-price. It is the ordinary case of a resulting trust. It is evading the question to call the trust constructive, because the fiduciary relationship does not exist unless the agreement intended to create it is valid, and that is the very question to be determined. Where, therefore, pursuant to an oral agreement, the purchase is made and title is taken in the name of one of the parties, the interest of the others will be found to be determined, not by the provisions of the agreement in question, but by the amount of the respective contributions to the fund which has been used to pay for the property. Indeed, there is no necessity for any agreement at all in such cases. Thus, where one orally agreed with three others to buy land on joint account, each to have one quarter, and all to contribute in equal amounts to the purchase-money, and one of them, violating the agreement, procured from the owner a bond for the conveyance to himself of two fifths of the property, and to each of the others one fifth of the property, it was held that no resulting trust would attach to such two fifths in favor of the other parties.[2]

[1] Fairchild *v.* Fairchild, 64 N. Y. 471.

[2] Bailey *v.* Hemenway, 147 Mass. 326.

And Morton C. J., writing the opinion, says that a resulting trust depends upon the fact that the money of the person claiming it was actually used in the purchase, and that his rights cannot be enlarged by any future payments or tenders, even though made pursuant to the terms of the oral agreement; and he quotes from Chancellor Kent to the effect that "the trust results from the original transaction at the time it takes place, and at no other time, and it is founded on the actual payment of the money, and on no other ground." On the other hand, of course, if an oral agreement of copartnership were made to purchase a certain piece of real property, and the proposed copartners contributed to the fund which was used in the purchase, title being taken in the name of one of them, with or without actual fraudulent intent, a trust would result in favor of the others according to the exact amount of their contributions, even though the agreement were invalid for all purposes, and therefore ineffectual to create the status of copartnership. It is not that the oral agreement to form a copartnership is valid. It may be that the relationship of copartners was not created by it at all. It is the contribution towards the purchase-money that makes the co-proprietorship, irrespective of the agreement, and, it may be said, in spite of the agreement, or without any agreement, so far as may be necessary to determine the extent of the interests.

(*b*) Neither is the question to be confused with the one that arises where, the status of copartnership having been *previously* created by whatever form of valid agreement, one of the copartners thereafter purchases real estate within the scope of the partnership agreement. That condition of things calls for the application of the doctrine of constructive trusts, or, in certain cases, of both the doctrines of constructive and resulting trusts; that is to say, where one partner takes title in his own name to such real property and expends his own funds, it is only a case of constructive trust evolved out of the fiduciary relationship. A court of equity imposes the trust so as to nullify the breach of confidence. But where one partner, in acquiring title in his own name to such real property, uses partnership funds, there is not only room for imposing (constructing) the trust, because of the fiduciary relationship, but for declaring the resulting trust, because the partner attempted to be excluded has, by virtue of his membership in the partnership, provided part of the purchase-money. If his contribution to the partnership fund is different in amount than the interest secured to him by the terms of the anterior valid agree-

ment of copartnership, his interest in the property acquired will, of course, be governed by the terms of that agreement. Such cases do not tend to throw any light upon the question of the validity of oral agreements to form copartnerships for the acquisition of real estate. "The agreement to put the land into the joint stock was made before the firm had any being, and the partnership fund did not pay for it." [1] "It is true that a trust in lands cannot be predicated upon proof of an oral agreement to create a partnership for the purpose of purchasing and handling or improving such lands, the partnership relation not having existed prior to acquisition of title, and no partnership funds having been invested in the property. To recognize a trust in such cases would be to abrogate the Statute of Frauds in this particular." [2] "Proof of a partnership for the purpose of buying and selling lands presents a different question from that which arises when an *existing* partnership purchases land for its use." [3]

(*c*) For the purposes of the narrower question under consideration, it may be conceded that where, by the oral agreement in question, the interest of one of the proposed partners is not to be in the real property, but only in the profits that may be derived from its purchase and sale, the statute has no application. Such agreements do not really contemplate real property partnerships at all. Perhaps the most satisfactory definition of a partnership ever formulated is the one recently suggested in the February, 1899, number of the American Law Register, at page 127, to the effect that a partnership is an association of persons to carry on business together as *co-proprietors*. In the case just referred to, there is no co-proprietorship at all. The joint interest is not to be in the real property, but only in the profits derived from its purchase and sale. There is no agreement to vest, in all of the parties, any estate or interest in real property, and the transaction therefore is one outside of the purview of the statute. It may, of course, as a practical matter, often be difficult to determine whether by the agreement in question it is intended that the interest should be in the profits, or be in the property, but that does not affect the soundness of the distinction.

Thus it was held in Snyder *v.* Wolford [4] that an oral agreement by which one is to negotiate the purchase of land, and the other is to pay the price and take title in himself, and providing that

[1] Sharswood, J., in McCormick's Appeal, 57 Pa. St. 54.
[2] Kayser *v.* Mongham, 6 Pac. Rep. (Col.) 803.
[3] Fairchild *v.* Fairchild, 64 N. Y. 471. [4] 33 Minn. 175.

when the land is sold the profits are to be divided between them, is not within the statute. It was said by the court that the agreement manifestly did not contemplate that plaintiff should have any estate or interest in the land, or be interested in any way in the transaction, unless upon a sale there should be a profit, and that the agreement was rather one of employment or agency than for an interest in real estate. Upon this construction the agreement, of course, was not one for the formation of a copartnership at all. And yet this is one of the cases relied upon as showing the tendency of modern decisions in the direction above pointed out. So, too, in Coward *v.* Clanton,[1] under a substantially similar state of facts, the court said that the contract, as between the parties to it, did not in any way affect the title to real estate. "The subject-matter of the contract was the *profits* to be realized from sales made, and the controversy here is as to such profits and the adjustment of accounts as between the partners." Upon a second appeal, however, in the same case,[2] it was said that the agreement between the parties constituted no partnership at all, and that sharing the profits was no test. The same distinction is pointed out by Cooley, C. J., in Carr *v.* Leavitt:[3] "The contract did not contemplate that, in any contigency, an interest in the lands was to be conveyed to, or vested in, the plaintiff. It contemplated only that in a certain event the plaintiff should receive a share of the moneys that a sale of the land would bring. His interest was, therefore, in these moneys, and not in the land itself."[4]

(*d*) Then there are the cases of oral agreements to form partnerships for *trading* in lands rather than for permanent investment or operation, but where it is intended that the title to the lands, while held by the partnership, should be in all the partners; that is to say, making the partners co-proprietors in the lands until they are disposed of. The question, of course, by the introduction of this element of co-proprietorship, becomes more complicated. It might certainly be said that such an agreement is no different, from the point of view of the Statute of Frauds, from the one where A orally agrees with B (no question of partnership being involved) to purchase a piece of realty, and then to convey to B a certain undivided interest therein for the proportionate part of the cost. If A, pursuant to that arrangement, or in violation of it, thereupon acquires title in his own name, furnishing the

[1] 79 Cal. 23. [2] 55 Pac. Rep. 147. [3] 54 Mich. 540.
[4] Babcock *v.* Read, 99 N. Y. 609, *acc.*

entire consideration, and then repudiates the arrangement, will it be said that any trust in favor of B arises by implication of law? The authorities are quite uniform to the contrary, and they go upon the ground that an interest in land is intended to be created by such an agreement. It is, of course, not the ordinary case of an agreement by an owner of land to convey it or part of it to another, but, as was said by the Supreme Court of the United States in Dunphy *v.* Ryan,[1] "it is a contract for the sale of lands, and not being in writing signed by the vendor is void. The circumstance that the defendant, not owning the land which he agreed to convey, undertook to acquire the title, instead of taking the case out of the statute, brings it more clearly and unequivocally within its terms."

But what is the distinction in principle between an agreement by A to purchase and then transfer a part to B, and one to form a copartnership between them for such a purchase? As already stated, the difference is not one arising from the existence of a fiduciary relationship, because, unless the agreement intended to create the relationship is valid, there is no such relationship. Where the partnership feature is eliminated, the authorities are found to go great lengths in applying the statute and vindicating its spirit. We do not then hear anything of a protest against using the statute as an instrument of fraud. All so-called ethical considerations are ignored, protest is made against "frittering away" the statute, and we are told, and of course told correctly, that it is not fraudulent to refuse to carry out an agreement that cannot be enforced because it is invalid under the statute. "The mere failure to perform a parol agreement which was made in good faith is not fraud."[2] "A party in no legal sense commits a fraud by refusing to perform a contract void by its provisions."[3]

Thus, where plaintiff and defendant made an oral agreement that defendant should bid off an estate about to be sold at auction, for the joint account of both parties, in equal shares, and defendant bought and took title in his own name, it was held that plaintiff could neither enforce a trust in his favor in the land after it was conveyed to the defendant, nor maintain an action at law for a breach of the agreement.[4]

The same question was involved in a later Massachusetts case,[5] where the court said: —

---

[1] 116 U. S. 491.
[2] Feeney *v.* Howard, 79 Cal. 525.
[3] Levy *v.* Brush, 45 N. Y. 589.
[4] Parsons *v.* Phelan, 134 Mass. 109.
[5] Emerson *v.* Galloupe, 158 Mass. 146.

"The plaintiff must recover, if at all, on the fact that, having agreed to act in part for them, defendant has violated that agreement and acted solely for himself. The agreement was within the statute, and no trust in the equitable title can be enforced unless it arise by implication of law. It is contended that such cases fall within the exception of trusts which may arise or result by implication of law; but we cannot construe that exception as extending to a trust which arises from the plain words of a contract merely because the words promise it by implication instead of setting it forth at length. When a man promises to buy land for another, he promises to hold it for that other after he has bought it, and it makes no difference in the applicability of the statute whether the latter promise is uttered in separate words or not." [1]

When the agreement is one not simply for the purchase of real property, but for the formation of a copartnership in connection with its acquisition and disposition, what substantial distinction is made? It may be admitted that the agreement has two aspects, — one the joint purchase of realty, and the other the formation of the copartnership; and that, if efficient to create the status of partnership, the validity of its other features, from the point of view of the statute only, becomes a matter of no importance. But there would seem to be no warrant for sustaining that part of it that creates the relationship and rejecting the rest of it. It may be that the relationship may develop out of the subsequent acts of the parties, and, having been created, impress its attendant incidents upon the transactions that ensue upon such creation, but that can have no bearing upon the validity of the anterior agreement. The fallacy lies in the failure to inquire in each case if the existence of the copartnership has preceded the acquisition of the realty by the party who is attempted to be charged with the trust. The fiduciary relationship is lacking, up to the time of making the agreement under consideration, so that the case would seem to be on all fours with the two Massachusetts cases above referred to. This distinction is well illustrated in Raub *v.* Smith,[2] which was a case of oral agreement to invest in land, and, if found to be valuable, to form a copartnership to work it. Defendant refused to form the partnership, purchased the lands in his own name, sold them and refused to share the profits. Relief was denied, on the ground that the contract for the purchase of the land was included in the contract to engage in the partnership, and is made the basis thereof.

[1] *Acc.* Walker *v.* Herring, 21 Gratt. 678; Clarke *v.* McAuliffe, 81 Wis. 104; Speyer *v.* Des Jardins, 144 Ill. 641.

[2] 61 Mich. 543.

We were considering at this stage the case of an agreement for the formation of a partnership for *trading* in lands rather than for permanent investment or operation, because that distinction is made squarely by some of the cases. Thus in Bates *v.* Babcock,[1] it was said that a partnership formed for the purpose of buying and selling lands may be formed in the same manner as any other, and that its existence may be established by the same character of evidence. "It does not contemplate any transfer of land from one party to the other, or the creation of any interest or estate in lands. In one sense the parties to such an agreement may be said to have an interest in the lands that are to be purchased under the agreement, — that sense in which the *beneficiary*, under a trust for the sale of real estate and payment to him of the proceeds of the sale, has an interest in the land; but it is only a pecuniary interest resulting from the sale, and a right to have the land sold, rather than an interest in the land itself. . . . A bill for the conveyance of the lands could not be maintained under such an agreement, but, by reason of the acts of the parties thereunder, an equity would be raised in their behalf which would be superior to the legal title held by him to whom the land was conveyed, and would control that title in subordination to this superior equity." It is said by the court that under such an agreement it is invariably held that an action for the division of the profits can be maintained after they have been received, whereas, if the agreement were invalid at the outset, they could not form the basis of such an action. This is a refreshing departure from the usual unintelligible declaration that the Statute of Frauds has no application to an executed agreement. Many judges would have rested their decision upon that doctrine, not realizing that by so doing they in effect enforce agreements invalid under the Statute of Frauds. The court in that case evidently meant to make a distinction between oral agreements of copartnership for trading in lands and those formed for the acquisition and holding of lands, for they say: "That the agreement between the parties did not contemplate any transfer of the land, or of any interest therein, to the defendants, or either of them, but had for its object only a division of profits and losses which would remain after its sale, is shown by a consideration of the complaint, and also by the direction of Babcock to the plaintiff, while negotiating the agreement, to 'sell it off as soon as you can, pay up the debts, and divide the pro-

[1] 95 Cal. 479.

fits.'" With the construction given by the court to the facts, the agreement is no different from that of Snyder *v.* Wolford, *supra*, where it was expressly provided that title should be taken in the name of one of the parties exclusively, and that the entire purchase-money should be furnished by him.

The inference from the reasoning of the court is that if, by the terms of the agreement to form a copartnership, it had been intended to vest in all the parties the title to the real estate as it was acquired, the court would have declared the agreement to be invalid under the statute. They say, in effect, that, because the interest of the plaintiff was to be one in profits and not in the realty itself, the statute has no application. And upon no other theory is it possible to explain the statement of the court that a bill for the conveyance of the lands could not be maintained, under the agreement before the court, by one of the partners against the other holding the title.

(*e*) A further objection is made to applying the Statute of Frauds to these agreements for real property copartnerships, that at the time of the making of them there is generally no question of the transfer of land by one to another of the parties to the copartnership proposed to be formed, and in making this objection it is sometimes conceded that where the property intended to form part of the copartnership assets is then in one of the proposed partners the statute would apply.

In Chester *v.* Dickerson,[1] where the oral agreement was sustained, it is said: "But suppose two persons by parol agreement enter into a partnership to speculate in lands, how do they come in conflict with the Statute of Frauds? No estate or interest in land has been granted, assigned, or declared. When the agreement is made, no lands are owned by the firm, and neither party attempts to convey or assign any to the other. The contract is a valid one, and in pursuance of this agreement they go on and buy, improve, and sell lands. While they are doing this, do they not act as partners, and bear a partnership relation to each other? Within the meaning of the statute in such case neither conveys or assigns any land to the other, and hence there is no conflict with the statute." It might again be said here that it is begging the question to assume that the agreement is effective to create the status of partnership. The parties to the agreement may, after making it, in some competent way assume the attitude

[1] 54 N. Y. 1.

of copartners, or they may proceed upon a mistaken notion that the agreement was valid and accomplished its purpose, but that cannot retroactively make valid an agreement that at the time of its making was invalid. Of course, if the agreement is valid that is an end of the matter, because, the relationship existing, property afterwards acquired pursuant to it, even without the contribution of joint funds, must belong to the partnership. But it would seem as if the above reasoning were sufficiently answered by the argument in Dunphy *v.* Ryan, *supra*, that the circumstance that the title to the lands proposed to be owned has not yet been acquired, "instead of taking the case out of the statute, brings it more clearly and unequivocally within its terms."

In Henderson *v.* Hutson,[1] an oral agreement that purchase of lands should be made, and that the plaintiff should be deemed a partner in the purchase, was held void, the court saying: "Although, in the case before us, it was not immediately between a buyer and seller of land, yet it is within the mischief intended to be guarded against by the statute, which, being a remedial one and intended to prevent a growing evil, ought to be liberally construed."

And again it may be said that, if the objection in question constitute a distinguishing principle, the same rule should apply where A and B, without intending to form a copartnership, agree that one of them will acquire a piece of property, in which each shall have an interest according to contributions proposed to be made to the cost. For here, too, the fact is that when the agreement is made no lands are owned by either, and neither party at the time attempts to convey to the other; and yet the case of Parson *v.* Phelan, *supra*, and others previously cited in the same connection, in holding such agreements to be invalid, represent no dissent from the general current of authority. It is difficult to see what difference in principle there can be between such an agreement to acquire lands as tenants in common, and one to acquire them as partners where the partnership relation had not previously existed.

It would seem, therefore, where an oral agreement is made to form a copartnership to purchase real estate, in which each of the partners should have an interest, and one of the parties thereafter, before anything else is done to constitute a copartnership, acquires title to real estate within the scope of the copartnership, in his own name, and contributing the entire purchase-money, that the

[1] 1 Munf. 510.

other party, the one excluded from the purchase, is in no position to have a trust declared in his favor. A very learned exposition of that doctrine is made by Judge Story in Smith *v.* Burnham,[1] where, with his usual very learned review of the cases, he says: "It was contemplated, according to the very structure of the bill itself, that, upon every purchase made under the express contract of partnership, the plaintiff should have an interest in the lands purchased to the extent of one moiety for his share in the partnership. Now, if the purchase was made in the name of Burnham as to one moiety, it was to be in trust for the plaintiff. By the Statute of Frauds, all estates made or created by parol, and not put in writing, and assigned by the party making or creating the same, are mere estates at will. . . . If the agreement could be treated as a sale by the defendant to the plaintiff of any interest in the lands to be purchased, it would be within the statute. If it could be treated as the case of an estate created in lands, it would be a mere estate at will, which would defeat the whole intention of the agreement, and the whole object of the bill. I incline to think that it properly falls under neither of these predicaments, but that it is a case of the declaration or creation of a trust in lands not arising or resulting by implication or operation of law. The trust arises *eo instanti* upon each purchase, and is then to attach, if at all." The suit was one in which it was claimed that plaintiff and defendant entered into an agreement to become partners in the business of purchasing and selling lands, upon a joint capital to be furnished by both, and the profits and losses to be equally shared, and the question of the creation of the partnership relation by the agreement itself was directly involved.

In Caddick *v.* Skidmore,[2] it is said by Chancellor Cranworth that "an agreement to the effect that the plaintiff and defendant would become partners in the colliery, for the purpose of demising it upon royalties which were to be divided in some proportion between them, would, in my opinion, be an agreement not capable of being enforced unless proved by such evidence as is required by the Statute of Frauds, for there does not appear to be anything to take this case out of the operation of the statute." And the Chancellor proceeded expressly upon the ground that the agreement was one for the purchase of an interest in land. The circumstance that one of the parties was, at the time of the making of the agreement, the lessee of the mine, does not appear to have had any weight with the court.

[1] 3 Sumn. 435. [2] 2 De G. & J. 52.

In Bird *v.* Morrison[1] the court calls attention to the many successful invasions upon the statute, but insists that none of them goes to the extent of holding a bald parol agreement for a partnership in real estate, as such, may be shown to create a trust in land held by one of the parties under a deed absolute on its face. "What safety would there be if the proposition were once established, that by alleging a partnership the Statute of Frauds is entirely evaded, and parties may then prove whatever interest in land they pleased by parol, against the absolute title of the deeds? Our conclusion may be thus stated: An agreement for a partnership to consist in dealings in real estate is within the Statute of Frauds, and void unless in writing." Expressions are found in cases, of which Allison *v.* Perry[2] and Meagher *v.* Reed[3] are instances, to the effect that where a partnership is *constituted* under a parol agreement it may be shown that its property consists of land, and it may own, possess, and enjoy the same. It is expressions like these that lead to the confusion on the subject. They may be unobjectionable if they mean that the Statute of Frauds can only be invoked in contests between partners themselves, and that third persons may prove by parol evidence that certain property belongs to an apparent partnership, and is affected with partnership equities. And they are wholly unobjectionable, even as to contests between the partners themselves, if it be meant that the evidence is competent, after it has been shown that the partnership was in fact "constituted;" that is to say, legally constituted. But these expressions are seized upon as authority for the doctrine that oral agreements for partnerships to acquire real estate, whatever their scope, and whatever the interest intended to be created in all of the proposed partners, are valid.

The court in Benjamin *v.* Zell[4] seems to regard the matter of intention to create an interest in the land in all of the proposed partners as a distinguishing feature. "An interest in contingent profits, arising from a sale to be thereafter made, does not give an interest in the land itself." That is to say, if the interest were in the land itself, the result would be different.

In Young *v.* Wheeler[5] a demurrer was sustained to a bill by one claiming to be a partner, to obtain a conveyance of an interest in lands on the ground that they belonged to a partnership formed for buying real estate, the bill alleging that the partnership was

[1] 12 Wis. 153. [2] 22 N. E. Rep. 492. [3] 24 Pac. Rep. 681.
[4] 100 Pa. St. 33. [5] 34 Fed. Rep. 98.

formed both by means of personal conversations and by letters. "If it be taken to be a partnership, as alleged by the plaintiff, for buying lands in which the plaintiff was to have an interest, although the title thereto should be taken in the name of the defendant Wheeler, the agreement would, if shown, tend to establish a trust on the part of Wheeler in respect to these lands for the plaintiff; and that cannot rest in parol under the statute."

In Flower *v.* Barnekoff[1] it was held that a valid contract of partnership for the purpose of *speculation* in real estate may be made by parol. It is there correctly said that many of the cases go much further than was necessary in order to admit the proof of the formation of the partnership in the case before the court. "The contract of purchase from Tucker," says the court, "was not secured to hold as land, or with any intention of ultimately vesting the legal title in the partnership, but for the purpose of sale and the acquisition of profits. It was secured simply as an article of commerce and for speculation." The court also refers to an earlier Oregon case in which it was said that the doctrine laid down in Dale *v.* Hamilton was "better adapted to the course of business in this country, where mercantile, manufacturing, and various other partnerships are necessarily compelled, in the course of their business, the investment of their capital, and the collection of debts due them, to become the owners of real property." In other words, expediency dictates the necessity of emasculating a positive enactment.

In Jones *v.* Davies[2] it was held that where several parties unite in the purchase of real estate, not as a permanent investment but as a speculation, and with a view of selling the same for profit, the land will be regarded in equity as personal property, and the oral agreement, though construed to be one of copartnership, will not be held to be within the statute. Having come to that conclusion, it was, of course, proper for the court to add that "in such cases it is immaterial in whose name the purchase is made or the title taken; that the property, wherever the legal title may be placed, will be deemed partnership property, and the parties entitled to the rights and subject to the liabilities of partners."

In Cameron *v.* Nelson,[3] after an intelligent summary of distinguishing principles, it is held that an oral agreement contemporaneous with the conveyance of the entire title from A to B, providing that B was to have a beneficial interest in one half, and

[1] 20 Ore. 132. [2] 56 Pac. Rep. (Kans.) 484. [3] 77 N. W. Rep. (Neb.) 771.

was to hold the legal title to the whole, sell the land and pay to A one half the proceeds, was an attempt to create a trust relating to lands, and void because not evidenced as required by the statute. It is interesting to compare this case with those like Carr *v.* Leavitt, Babcock *v.* Read, Coward *v.* Clanton, *supra.*

In Brosnan *v.* McKee [1] it was held that an oral agreement to pay plaintiff a certain sum for negotiating a purchase of certain mills, the title to be in the names of both parties, and for the formation of a partnership in a business to be carried on at said mills was an agreement within the statute. "It is one for the purchase of land, and should have been in writing. The agreement was that the plaintiff was to purchase the land whereon the plaster-bed was located, for both parties, and that said purchase was to be in part for the plaintiff, and the title to the property was to be taken in the names of both parties; and it was this interest, as well as the promise of the partnership in the business, which constituted the consideration upon which the plaintiff relies for recovery."

We have still to consider the argument sometimes used, that the statute has no application to agreements of copartnership, because, as it is said, partnership real estate is always treated as personalty. In Chester *v.* Dickerson, *supra*, it was said: "It is claimed that such an agreement is not affected by the Statute of Frauds, for the reason that the real estate is treated and administered in equity as personal property for all the purposes of the partnership. A court of equity having full jurisdiction of all cases between partners touching the partnership property, it is claimed that it will inquire into, take an account of, and administer upon all the partnership property, whether it be real or personal, and in such cases will not allow one partner to commit a fraud or a breach of trust upon his copartner by taking advantage of the Statute of Frauds."

It may here, too, be said at the outset that it is begging the question to call the lands partnership property. They are not partnership property unless the agreement for the formation of the partnership was valid. The weakness of that argument appears when it is somewhat transposed. It amounts to saying that an oral agreement to form a copartnership to deal in lands is effective to create the copartnership because lands belonging to a partnership that has been effectively created are treated, not as lands, but as personalty. In the same way, in Bates *v.* Babcock, it is said

[1] 59 Mich. 107.

that it is a familiar rule in equity that lands acquired by a partnership for partnership uses are partnership assets, and are treated in equity as personalty, whether the partnership was formed by oral or written agreement; but no fault is to be found with this statement in the light of its subsequent explanation by the court, where it says that "*upon proof of the existence of such a partnership* the rights and obligations of the respective partners should be determined upon the same principles and with the same results as in other partnerships;" by proof being meant competent proof. For nothing occurs in the statute to exclude the application of its provisions to the case of parties attempting unsuccessfully to create a copartnership.

It is, however, probably not true, at least in this country, that partnership real estate, except for the payment of debts, is treated as personal property. Partnership real estate remaining after the payment of debts is considered and treated as real estate which would go to the heirs of the partners according to their interests. In England it is said that the rule would probably be otherwise, and that the surplus would go to the personal representatives, on account of the great injustice which would otherwise result from its laws of inheritance.[1] The rule contended for is not one of universal application.[2]

However, as already said, the doctrine, even as contended for by such cases as Chester *v.* Dickerson, *supra*, applies in terms only to partnership property, and cannot justly be said to assist us, even if accepted to the length in which it is stated, in determining if a copartnership was in fact created.

To resume, finally, it may be said: —

(1) That irrespective of any agreement, or the legal title, the trust results in favor of those who contribute the purchase-money, whether they be partners or not.

(2) That if the partnership, or other fiduciary relationship, exist, a trust is constructed in after-acquired realty in favor of him who relied upon that relationship, and who is excluded from the legal title.

(3) That an oral agreement of copartnership which contemplates the taking of the legal title in one of the partners, and the contribution of the entire purchase-price from his own funds, the interest of the other partners to be limited to a share of the pro-

[1] Fairchild *v.* Fairchild, 64 N. Y. 472; Black *v.* Black, 15 Ga. 449.

[2] *In re* Robinson Estate, 43 Atl. Rep. (Penn.) 207; Oliver *v.* Oliver, 49 S. W. Rep. (Ky.) 473.

fits realized from a sale of the realty, is valid, because not creating an interest in lands, and the agreement establishes the relationship of partners.

(4) That when two parties orally agree that certain realty shall be acquired by one of them, and thereafter conveyed, so that they shall hold the same as tenants in common and not as copartners, the agreement is void, but to the extent that the party complaining has contributed to the cost of the property a trust results in his favor.

(5) That where two parties orally agree to form a copartnership to acquire and hold real estate, an interest in which shall be vested in both of them, the agreement is void and ineffectual to create the relationship; but if one of the parties thereafter acquire the realty, and the other contribute to the cost, a trust results in his favor to the extent of his contribution, and not because of any fiduciary relationship, and the size of his interest is determined by the amount of the contribution, and not by the terms of the agreement.

Jesse W. Lilienthal.

SAN FRANCISCO.